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Constitutional Law -- De Facto Segregation -- The Courts and Urban Education

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move litigation from state courts unless a statute clearly so requires.[32]

The Supreme Court was undoubtedly correct in its construction of the Act. Even though the use of interpleader to effect proration among all claimants will result in delay before any successful claimant can get execution against an insurer, and even though a claimant will have to go into a second court to collect, the benefits of an equitable distribution will inure to all claimants and outweigh the procedural disadvantages. This is the only effective device at present to achieve proration, and it might be desirable for Congress to extend the provisions of the Act to allow an insurer to bring in the underlying litigation in appropriate cases,[33] since this would in turn encourage insurers to interplead all claimants. But the better solution might be other legislation, based on minimal diversity,[34] to allow a claimant to demand proration, leaving injured parties free to bring their actions on liability in whatever courts they choose.

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Constitutional Law—De Facto Segregation—The Courts and Urban Education

In the controversial decision of *Hobsen v. Hansen*,[1] the United States District Court for the District of Columbia[2] found evidence of discrimination in the policies, practices and administration of the School Board and in the continued existence of *de facto* segregation[3] in the school system. The court concluded that the Negro

[32] *E.g.*, National Cas. Co. v. Insurance Co. of North America, 230 F. Supp. 617 (N.D. Ohio 1964). Professor Chaffee argued that interpleader should not extend to trials on liability. Chaffee, *Federal Interpleader Since the Act of 1936*, 49 YALE L.J. 377, 420 (1940).

[33] For example, when most of the claimants are from a single state and the interpleading insurer is the principal fund holder as in Commercial Union Ins. Co. v. Adams, *supra* note 28.

[34] In the words of the Supreme Court, "Art. III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse parties are not co-citizens." 386 U.S. at 531.

[1] 269 F. Supp. 401 (D.D.C. 1967)

[2] Judge J. Skelly Wright, a member of the United States Court of Appeal for the District of Columbia, was sitting as District Judge in this suit pursuant to 28 U.S.C. § 291 (c) (1964).

[3] *De facto* segregation is a term used interchangeably with racial imbalance denoting a fortuitous separation of races. A predominantly northern and western phenomenon, it occurs when rigid neighborhood pupil assignments are imposed on racially homogeneous neighborhood populations. See

students were being unconstitutionally deprived of their right to equal protection under the law as guaranteed by the fourteenth amendment.[4]

The decision itself is susceptible to various interpretations, for educational, social, and political considerations are intricately interwoven within it. To acquire a meaningful understanding of the court's position it is necessary to make a threefold analysis of the decision: (1) the legal and constitutional issues in the decision, (2) the practical effect of the decision on the D.C. school system, and (3) the impact of the decision on the national level, particularly as it relates to the development of educational policy in the urban public schools. No attempt will be made to resolve the problems raised in this analysis, but certain alternatives to the court's position will be suggested.

Legal and Constitutional Issues

The conclusions of law enunciated in *Hobsen v. Hansen* were based on a close scrutiny of the evidence presented, which included a detailed empirical study of the D.C. School System. The court subsequently made the following findings of fact: the school authorities, relying principally on the neighborhood concept[5] of pupil assignment, were indifferent and apathetic to the resultant *de facto* segregation and demonstrated in their attitudes an affirmative acceptance of the status quo;[6] discriminatory practices were used in the placement of teachers and principals; inequality existed in

Comment, *Racial Imbalance in the Public Schools: Constitutional Dimensions*, 18 VANDERBILT L. REV. 1290, 1291 (1965).

[4] In Bolling v. Sharpe, 347 U.S. 497 (1954), the companion case of Brown v. Bd. of Educ., 347 U.S. 483 (1954), the Supreme Court held that the equal protection clause's proscription against *de jure* segregation was an element of due process in the fifth amendment and thereby applicable to the District of Columbia. Recent developments in the field of constitutional law, including the frequent "incorporation" of parts of the first eight amendments in the fourteenth amendment due process clause and the increasing use of the equal protection clause to protect individual liberties, lead the court to conclude that "the doctrine of equal educational opportunity—the equal protection clause in its application to public education—is in its full sweep a component of due process binding on the District under the due process clause of the Fifth Amendment." Hobsen v. Hansen, 269 F. Supp. 401, 493 (D.D.C. 1967)

[5] The neighborhood concept of school districting and assignment has long been considered a basic tenet of American public education. The critics feel that this concept, which originated in a predominantly rural environment, no longer has relevance in the complex, urbanized, and more impersonalized school systems of today. *Id.* at 409.

[6] *Id.* at 503.

the distribution of educational resources to the segregated schools;[7] and the track system[8] discriminated in practice, if not in theory, as it grouped students on the basis of their socio-economic or racial status instead of their natural ability.

In response to these findings, the court permanently enjoined the District of Columbia school system against racial and economic discrimination, abolished the optional zones[9] and the track system, ordered bussing of volunteer Negro students who wished to transfer to undercrowded (white) schools, and ordered substantial integration of the faculty of each school.[10] The court further ordered the Board to submit a plan to the court by October 2, 1967, concerning reasonable alternatives, such as educational parks or school pairing,[11] to correct the racial imbalance.[12] The court refused to support plaintiff's contention that an "area-wide" metropolitan system, crossing state lines, was constitutionally required, although it did suggest that defendants inquire into the possibility of such an alliance with the surrounding suburbs.[13]

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[7] The court considered the following factors: (a) age of buildings, (b) physical condition of schools, (c) physical congestion within the schools, (d) quality of faculty, (e) textbooks and supplies, (f) per pupil expenditures, and (g) curricula and special programs. *Id.* at 431-442.

[8] The track system is a form of ability grouping at both the elementary and the secondary levels in which students are placed on certain curricula tracks according to their ability to learn as determined by teacher evaluation and standardized tests. Approximately 50 of the 114 pages of the original text were devoted to an examination of the system, evidencing the court's awareness of the danger of abolishing a legitimate, even if poorly administered, educational technique.

[9] The optional zones allowed students to choose from two or more schools instead of being assigned to a specific neighborhood school; this had the net effect of allowing whites to escape from predominantly Negro schools to predominantly white schools. Hobsen v. Hansen, 269 F. Supp. 401, 415-18 (D.D.C. 1967).

[10] *Id.* at 516.

[11] *Id.* These are the two most frequently mentioned methods to integrate schools, but both require that white communities be reasonably close to Negro communities.

[12] Racial balance is a physically impossible goal in the District schools, for over 90 percent of the students enrolled are Negroes, and this percentage is increasing annually.

[13] *Id.* at 516. If this case had involved only school districts within a single state, a different result might have occurred. See Wright, *Public School Desegregation: Legal Remedies for De Facto Segregation,* 40 N.Y.U. L. REV. 285, 305-06 (1965): "Undoubtedly if and when the Supreme Court tackles the suburban *vis-a-vis* the slum problem, it will again remit the remedy to the district courts [as it did in the reapportionment cases] with instructions to ignore the state-created political lines separating the school boards and to run its orders directly against the state, as well as local, officials."

The court's recognition and application of the equal educational opportunity principle in the *de facto* context represents the most controversial aspect of its decision.[14] It examines the evidence in light of three distinct theories—separate-but-equal, *de jure* segregation, and *de facto* segregation—to arrive at the conclusion that the Negroes have not received an equal educational opportunity under the law.

The separate-but-equal principle, a modern day reformulation of *Plessy v. Ferguson,*[15] means simply:

> [I]f white and Negroes, rich and poor, are to be consigned to separate schools . . . the minimum the Constitution will require and guarantee is that for their objectively measurable aspects these schools be run on the basis of real equality, at least until all inequalities are adequately justified.[16]

This theory is novel in the *de facto* context, but it has precedent in cases which preceded *Brown v. Board of Education.*[17] Although *Brown* appeared to reject any further application of this theory, the recent Supreme Court decision of *Rogers v. Paul,*[18] has been interpreted as implicity revitalizing this approach.[19]

The real importance of the theory lies in the larger question of whether a disproportionate share of resources need be given to the Negro schools to provide an equal educational opportunity. The court speaks of equality under the separate-but-equal theory in terms of "objectively measurable" aspects, but if the Negro is to overcome environmental and psychological handicaps and achieve at the same grade level as his white schoolmates, the quality of the facilities, teachers, and curricula must be superior to those in predominantly white schools.

In the court's discussion of necessary remedies, it speaks of the necessity of including measures of compensatory education in

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[14] This concept has been subject to close review recently by legal scholars. See T. EMERSON, P. HABER, AND N. DORSEN, POLITICAL AND CIVIL LIBERTIES IN THE UNITED STATES 1779 (3d ed. 1967); FISS, *Racial Imbalance in the Public Schools: The Constitutional Concepts,* 78 HARV. L. REV. 564 (1964); Rousselot, *Achieving Equal Educational Opportunity for Negroes in the Public Schools of the North and West: The Emerging Role of Private Constitutional Litigation,* 35 GEO. WASH. L. REV. 698 (1967).

[15] 163 U.S. 537 (1896).

[16] Hobsen v. Hansen, 269 F. Supp. 401, 496 (D.D.C. 1967).

[17] 347 U.S. 483 (1954).

[18] 382 U.S. 198 (1965).

[19] *See* United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd per curiam on rehearing en banc,* March 29, 1967.

the court-ordered plan, but it is uncertain whether this arises from the separate-but-equal theory.[20] Since it is equal educational opportunity rather than equality of expenditures that is the controlling constitutional principle, the distribution of unequal resources might well be justified:

> [C]ultural deprivation [suggests a] . . . classification wherein equality of concern and the equalization of educational opportunity requires the energetic and imaginative use of unequal resources in order to achieve essentially equal results.[21]

Under the *de jure* segregation theory, the court held that the system of assigning teachers and principals to schools according to personal preferences put the School Board in the position of sanctioning the resultant segregation patterns and thus was unconstitutional. A question arises whether the Board is constitutionally required to have a definite ratio of white and Negro teachers in each school. The court explicitly rejects the proposal for the present time.[22] The use of optional zones was also declared unconstitutional under this theory, as it constituted a subtle discriminatory policy allowing whites to escape from integrated schools to predominantly white schools.

The most important segment of the opinion, in terms of the constitutional issues involved, dealt with the third theory that *de facto* segregation in the D.C. school system unjustifiably denied Negro students the opportunity of an equal education. Following the lead of previous decisions[23] and recent views of legal commen-

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[20] Where because of the density of residential segregation or for other reasons, children in certain areas, particularly the slums, are denied the benefits of an integrated education, the court will require that the plan include compensatory education sufficient at least to overcome the detriment of segregation and thus provide, as nearly as possible, equal educational opportunity to all school children. Hobsen v. Hansen, 269 F. Supp. 401, 515 (D.D.C. 1967).

[21] COMM'N ON RACE AND EDUCATION, RACE AND EQUAL EDUCATIONAL OPPORTUNITY IN PORTLAND'S PUBLIC SCHOOLS 187 (1964), *as quoted in* Rousselot *supra* note 14 at 717. See also Horowitz, *supra* note 4 at 1167.

[22] Hobsen v. Hansen, 269 F. Supp. 401, 516 (D.D.C. 1967).

[23] See Blocker v. Bd. of Educ., 226 F. Supp. 208, *remedy considered on rehearing,* 229 F. Supp. 709 (E.D.N.Y. 1964). The court found unconstitutional segregation where the most that could be said of the Board, as in *Hobsen,* was that it had failed to correct an obvious racial imbalance for which it was not responsible. Jackson v. Pasadena City School Dist., 59 Cal.2d 876, 382 P.2d 878 (1963). Barkesdale v. Springfield School Comm'n, 237 F. Supp. 543 (D. Mass. 1965), *vacated and remanded with direction to*

tators,[24] the court interpreted *Brown* as requiring an independent assessment of the effects of segregation. *Brown* established the principle of equal educational opportunity, and it held that any segregation sanctioned by the "mandate of law or public policy pursued under color of law" was inherently unequal and unconstitutional.[25] But it did not speak to the question of whether a quantum of official discrimination was necessary to invoke the principle when significant harm was visited upon the Negro student, as determined by a close study of the fields of education, sociology, and psychology.[26]

Thus, where there is *de facto* segregation, for which the government is not responsible, the focus of inquiry must shift from an examination of the official's motives to an evaluation of the amount of detriment which occurs in the racially imbalanced schools. The *Brown* rationale is not applicable, however, if the court can find adequate justification for the inequality-producing classification—in this case adherence to the neighborhood school system of pupil assignment:[27]

> [W]ith every inequality producing classification there remains the question of justification. Ordinary statutory classifications resulting in inequalities economic in nature are traditionally upheld whenever the reviewing court can imagine a reasonable or rational basis supporting the classification . . . [T]he objectives they [the classifications] further must be unattainable by a narrower or less offensive legislative course; and even so, those objectives must be of sufficient magnitude to override,

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dismiss without prejudice, 347 F.2d 261 (1st Cir. 1965), unequivocably takes the position adopted in *Hobsen*:

> The question is whether there is a constitutional duty to provide equal educational opportunities for all children within the system. While *Brown* answered that affirmatively in the context of coerced segregation, the constitutional fact—the inadequacy of segregated education [based on expert testimony presented]—is the same in this case, and I so find. . . .

Id. at 546-47.

[24] Sedler, *School Segregation in the North and West: Legal Aspects*, 7 ST. LOUIS L.J. 228 (1962) states this concept in the form of a question:

> Can the state still educate him [the Negro] on an integrated basis thus providing equal educational opportunities and preventing feelings of inferiority and at the same time effectively operate its educational system?

Id. at 256.

[25] Hobsen v. Hansen, 269 F. Supp. 401, 493 (D.D.C. 1967).

[26] *Id.* at 419-21.

[27] *Id* at 506-07.

in the court's judgment, the evil of the inequality which the legislature engenders.[28]

The court also justifies the need for careful consideration of the merits of the neighborhood policy because this particular practice operates in such a way that the Negro and the poor are harshly and disproportionately disadvantaged, even though neither group is intentionally singled out for special treatment.[29] The cases which are cited to support this position, *Griffin v. Illinois*[30] and *Harper v. Virginia Board of Elections*,[31] are concerned primarily with economic discrimination. Taken by itself, a single reference to the economic factor is unimportant, but when it is added to references of economic discrimination in other parts of the opinion, specifically in the discussion of the track system and the separate-but-equal theory, the court's approach becomes ambiguous.

This constant equation of the Negro and the poor might be the embryonic beginning of a non-racial attitude by the courts toward the whole problem of urban living. This may mitigate the effects of the monolithic approach of many judges who are so preoccupied with the integration problem that they lack the prospective to comprehend the interrelated economic problems. The decision also avoids saying that *de facto* segregation is unconstitutional on its face; but it is doubtful that this court will ever accept a *de facto* segregation situation as permanently justified or necessary, at least from a legal standpoint. When the court balances the different considerations mentioned above, the educational and social advantages of integrated schools accrued to both white and Negro children outweigh the policies supporting strict adherence to the neighborhood schools concept.[32] Although the neighborhood plan per se is not held unconstitutional, the decree that the Board consider the feasibility of alternate measures suggests that strong reasons must be given before the benefits of an integrated education are denied to the Negro.[33]

The track system was held unconstitutional as it, too, represents an unjustifiable arbitrary classification. Although the court accepts ability grouping in general as reasonably relating to the govern-

[28] *Id.*
[29] *Id.*
[30] 351 U.S. 12 (1956) (fees required for appeal).
[31] 383 U.S. 663 (1960) (poverty and poll tax).
[32] Hobsen v. Hansen, 269 F. Supp. 401, 509-10 (D.D.C. 1967).
[33] *Id.*

mental function of public education, it maintains that such grouping must be founded on something other than the standardized tests[34] presently administered. These tests, the evidence shows, group according to environmental and psychological factors, not on the basis of innate ability. The results therefore are catastrophic to the Negro child who is grouped in the lower tracks with rigid curricula and little chance of freeing himself from the false self-prophecy of intellectual inferiority. The system is also condemned for its failure to include and implement a compensatory educational program that would provide more flexibility and more movement upward in the tracks.

Undoubtedly, the specific constitutional issues raised by the decision are important, but a significant legal problem exists on a more abstract level. The uncertainties[35] accompanying any balancing of constitutional rights on the basis of empirical data and the complexities of implementing a decree, once interference in the educational system is found to be necessary, obviously do not create stability or certainty in the legal process. The court is intervening in an area in which it has an acknowledged lack of expertise,[36] and its involvement causes one to ask certain elementary but important questions. Relating to the track systems, there is a real question of what type of ability grouping is justifiable, and how accurate tests must be before they constitute legitimate bases for grouping. If no satisfactory tests are developed, will the disadvantaged child be forced to compete in the classroom with the middle class white (though this is practically impossible) because no satisfactory tests (in the court's view) are devised? If bussing is the solution to correct the unconstitutional inequalities, then what practical considerations are involved? What weight is to be given to costs,

[34] See P. SEXTON, EDUCATION AND INCOME (1961), for the rationale supporting this position.

[35] "There can, of course, be no mathematical formula to determine at what point the unequal educational opportunity inherent in racial imbalance . . . rises to constitutional dimensions." Wright, *supra* note 13, at 303. Fiss agrees that "no matter how conscientious the court that decides the question, an irreducible amount of uncertainty will remain." Fiss, *supra* note 14, at 596.

[36] "It is regrettable, of course, in deciding this court must act in an area so alien to its expertise. It would be far better indeed for these great social and political problems to be resolved in the political arena by other branches of government." Hobsen v. Hansen, 269 F. Supp. 401, 517 (D.D.C. 1967). See Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem,* 58 NW. U.L. REV. 157, 182-86 (1963).

time spent in transit, or ineffective or detrimental results from the integrated experience? What considerations will guide the court if the "area-wide" school system is found to be constitutionally necessary, and how will the many side issues such as educational financing be resolved?

Practical Effects

Despite the prevalence of constitutional and legal problems in this area, the conclusions of the court are extremely important in terms of the actual impact of the decision on the D.C. school system. The decision will invariably have these initial consequences in Washington: (1) an increase in the number of white students migrating to the suburbs or to private schools, thereby increasing the total percentage of Negroes well over the ninety per-cent-plus figure that presently exists, and (2) the withdrawal from the system of many white teachers who are eligible for retirement benefits, especially if the court finds reassignment necessary. The court ruling has already forced Superintendent Hansen to resign his position.[37]

Regarding the actual decree in light of subsequent developments, the decision might have been unnecessary. Within a week of the decision Negroes gained a majority on the School Board for the first time in its history,[38] and would certainly have implemented most of the measures the court decreed. Moreover, as Carl Hansen pointedly noted in an interview[39] subsequent to the decision, the track system was to be abolished; a proposal for the discontinuance of the optional zones was already being considered; and the free bussing for children in overcrowded schools had been initiated prior to the issuance of the opinion. Finally, the Passow Report,[40]

[37] See The Washington Post and Times Herald, July 4, 1967, at A 1, col. 8. This resignation resulted specifically from the Board's refusal to appeal the decision which repudiated Hansen's policies and, to some degree, his integrity as an individual. The fact that he would probably resign in the face of an adverse decision, despite the three year renewal of his contract in March, 1967, was well known by those who participated in the suit.

[38] With a new majority the Negroes elected the first Negro President of the Board of Education. See The Washington Post and Times Herald, July 2, 1967, A 1, col. 1.

[39] U.S. NEWS AND WORLD REPORT, July 24, 1967, p. 42.

[40] The report on the D.C. school system made by Dr. Henry A. Passow of the Columbia Teachers College, cost 250,000 dollars and involved over 180 consultants and specialists. For a brief summary of the findings, see The Washington Post and Times Herald, Sept. 7, 1967, A 1, col. 6.

preliminary findings of which were available to the Board soon after the issuance of the opinion, contained extensive recommendations for the D.C. System, which included many of the court's ideas. It was based on exhaustive educational research and had been commissioned by the Board.

It would seem from these factors that the decision was to serve a dual purpose: (a) to repudiate the attitude implicit in the practices and policies of the school authorities and (b) to provide a new legal and moral basis for change. The public reaction[41] to the decision in Washington reinforces this view, for an atmosphere was created which made positive action by the School Board not only politically feasible but inherently necessary.

National Impact

Judge Wright was not interested, however, solely in the decision's catalytic effect on the D.C. educational power structure. The length of the text and its exhaustive detail emphasize that the impact of the decision was intended to be nationwide. Judge Wright obviously expected the case to be appealed ultimately to the Supreme Court, which required that the decision have a solid foundation in fact and in law. Moreover, as a Federal District judge, Judge Wright had been closely connected with the desegregation of public schools in Louisiana and the admission of Negroes to Tulane University.[42] His judicial experience thus eminently qualified him to make the first official, authoritative statement by a member of the federal judiciary on the relationship of the equal educational opportunity principle to the problem of *de facto* segregation in urban education.

It can also be surmised that Judge Wright was writing to and for the legal profession. In his decision, he establishes a model for legal change in the *de facto* area by constructing a framework in which the lawyer knows what type of evidence must be presented, and the judge is given a method by which specific constitutional issues can be resolved. Concurrently, his decision was intended to be a catalyst for change on the national level, to spur action in

[41] "The significance of the Wright decision . . . is that it gives the school system a mandate for change." Jacoby, *Mandate for Change*, The Washington Post and Times Herald, July 22, 1967, A 1, col. 4. The plaintiff, Julius Hobsen, stated that the Passow Report "would have wound up in the dust bin like the Strayer Report [the last study of the D.C. schools in 1949] if it weren't for the court decision." *Id.*

[42] See NEWSWEEK, July 3, 1967, at 49.

legislative bodies and school systems which have long bypassed this problem.[43]

The primary area in which this opinion will have national impact is the present-day civil rights movement. There is a split among civil rights leaders evidenced in their attitudes toward attempts to improve the educational resources in predominantly Negro schools. Some groups oppose a major commitment to ghetto schools. Other elements, primarily associated with the "Black Power" movement, have favored the improvement of educational resources in the ghetto schools.[44] The difference in attitude is explained by the former's assumption that the only possible avenue to equal education opportunity for the Negro child is through integrated classrooms. Such a view is implicit in *Hobsen v. Hansen,* and evidenced by the data[45] which is judicially noted to support the court's conclusions.[46]

The dilemma in which the court finds itself is that in Washington, and in other urban areas, integration is impossible, at least in the near future. Although the court is aware that racial imbalance cannot be solved in the D.C. schools (and this is what the separate-but-equal theory is all about), its attempt to deal with it is undermined by the acceptance of a principle which unequivocably rejects the segregated school. *Hobsen v. Hansen* advocates a self-defeating policy by focusing its attention on integration as the sole means enabling the Negro to attain the ultimate goal of educational equality. This is especially important since there is some indication that quality education can be had in the all-Negro school. The Passow Report[47] emphasized that quality education was possible, if and when adequate resources were allocated to the predominately Negro

[43] New York, California, Maryland and New Jersey were the first, and still remain, the principal states to take legislative action to correct imbalance. See 7 RACE REL. L. REP. 269 (1962); 7 RACE REL. L. REP. 738 (1962); 8 RACE REL. L. REP. 738 (1963); 8 RACE REL. L. REP. 1226 (1963).

[44] See Rousselot, *supra* note 14, at 715.

[45] See 1 U.S. COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967) (published in 2 vols.) [hereinafter cited as U.S.C.R.C. REPORT]; U.S. OFFICE OF EDUCATION, EQUALITY OF EDUCATIONAL OPPORTUNITY (Coleman ed. 1966) [hereinafter cited as COLEMAN REPORT].

[46] Alsop, *No More Nonsense About Ghetto Education,* THE NEW REPUBLIC, June 22, 1967, at 20, characterizes this attitude of the liberals:

> [G]hetto children can never be rescued, can never be educated, unless they are subject to the benign classroom influence of middle class children.

[47] *See supra* note 40; The Washington Post and Times Herald, Sept. 7, 1967, A 1.

D.C. schools. The "More Effective Schools"[48] program, initiated in Harlem in 1964-1965 is the latest of several new programs initiated for the ghetto schools. Its tests results indicate that Negro children can achieve at the same grade level with his middle class white counterpart even if taught in a segregated school.[49]

Though these special programs have not been as successful as their advocates might hope,[50] the realities of the situation alone dictate a more flexible approach by the court's than is found in *Hobsen v. Hansen.* If the white community does not accept the necessity of integration, and there is no indication that it is so predisposed at present,[51] then it may effectively block any implementation of corrective measures by moving further into the suburbs or by sending its children to private schools. And bussing is by its very nature confined to certain time and space limits.

This conflict between constitutional necessity and social reality will often leave the courts with no alternative but to revive such theories as the separate-but-equal principle. But again the basic dilemma reappears if the court has already committed itself to the view that a segregated education is inherently unequal for the Negro and that no amount of compensatory education can effectively overcome this disadvantage.

The court reaches its position that the integrated school is the primary solution to this problem by citing the latest sociological and psychological findings in this area, and by emphasizing the inherent destructiveness of a segregated society.[52] In the former, it implicitly relies on the *Coleman Report*[53] and the *United States Civil Rights Commission Report*[54] which includes the very latest research in this area.

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[48] See Alsop, *supra* note 46, at 21.

[49] See Maslow, *De Facto Public Segregation,* 6 VILL. L. REV. 353, 374-75 (1962); also Nancy Hoyt St. John, *The Effect of Segregation on the Aspirations of Negro Youth,* 36 HARV. L. REV. 284, 286 (1965). For a discussion of the different measures that can be used to educate the disadvantaged child, see Ornstein, *Program Revision For Culturally Disadvantaged Children,* 35 J. OF NEGRO ED. 117 (1965).

[50] See Swartz, Pettigrew and Smith, *Fake Panaceas For Ghetto Education: A Reply to Joseph Alsop,* THE NEW REPUBLIC, Sept. 23, 1967, at 16.

[51] See Alsop, *supra* note 46, at 19, for statistics on this rapid migration.

[52] Judge Wright quotes Fiss in the opinion: "Segregation perpetuates the barriers between the races; stereotypes, misunderstandings, hatred and the inability to communicate are all intensified." Hobsen v. Hansen, 269 F. Supp. 401, 504-05 (D.D.C. 1967).

[53] See *supra* note 45.

[54] *Id.*

The *Coleman Report* did not attempt to separate all other factors such as cultural deprivation or social class in determining the effects of racial imbalance. Its basic findings, however, did show that the equality of educational opportunity was lowered when culturally disadvantaged children were placed together in public schools. Also, it concluded that pupil achievement is more closely correlated to the aspirations and educational experience of the other students in the school than to the quality of the facilities, teachers, or curriculums.[55] The *U.S.C.R.C. Report,* however, re-analyzed the data in the *Coleman Report* and declared that there was a direct correlation between racial imbalance and Negro achievement: "There is . . . a relationship between the racial composition of schools and the achievement and attitudes of most Negro students, which exists when all other factors are taken into account."[56]

Despite this conclusion of the *U.S.C.R.C. Report,* the most significant finding in either report was that a Negro child's achievement is highly correlated with his belief that he can control his own destiny.[57] Coleman himself feels that "the one factor more highly related to achievement than anything else was the child's concept of whether his environment was responsive in any way to him."[58] Floyd McKissick, National Director of CORE explains this view:

> One wonders if that thing 'middle class' is not really a way of saying that the middle class child is helpless and vulnerable, that he knows his parents can and will go to bat for him, that he carries that attitude around with him, that his teachers perceive him differently, and that he is treated differently.[59]

It should be noted that the *Coleman Report* and the *U.S.R.C. Report* suggest that it is the poor in general, rather than the Negro in particular, who respond to good and bad schools.[60]

Hobsen v. Hansen foresees the danger in such a separatist view, and it appreciates the need for an integrated society as an ultimate

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[55] COLEMAN REPORT 22

[56] U.S.C.R.C. REPORT 204.

[57] See Jencks, *The Racial Gap,* THE NEW REPUBLIC, Oct. 1, 1966, at 22. This article contains an excellent summary of the findings of the *Coleman Report.*

[58] NEWSWEEK, Sept. 25, 1967, at 75.

[59] McKissick, *Is Integration Necessary?* THE NEW REPUBLIC, Dec. 3, 1966, at 35.

[60] See U.S.C.R.C. REPORT 79.

goal. But is not the court irresponsible in telling the Negro community that an integrated education is indispensable to a quality education for their children when it has neither the power nor the resources to create this necessary prerequisite. If it is accepted that the educational needs for the Negro are immediate and pressing, then the court should not create impediments to the resolution of these needs. Integration is only one of the means to an end, which is equality for all. Since there may be another means which are capable of producing this equality in education, the liberal community, and the expression of its views in the courts, must not limit the attention of "Negroes to the sole issue of integration, so that they cannot conceive of any other road toward equality."[61]

CONCLUSION

Hobsen v. Hansen is presently being appealed in the Circuit Court of Appeals for the District of Columbia. Regardless of whether the decision reaches the Supreme Court of the United States, its impact has already been felt nationwide.[62] In the process of dissemination, the actual content of the decision and its implications have often been inaccurately reported. This discussion was intended to give a more accurate analysis of the decision, concentrating not only on the narrow legal and constitutional issues involved, but on the intended and actual impact of the decision.

In the examination of the case several basic problems in the court's reasoning have been discussed. First, there is a latent ambiguity in the decision, resulting from the court's vacillation between an economic and racial analysis of the issues, although the racial element ultimately dominates the court's thinking.

Another problem raised is the role of the court in the educational process. Where should the line be drawn when judges decide issues normally delegated to the sphere of professional educators, to local school authorities, to the local community? Conversely, how may school authorities pursue legitimate educational concepts even if integration is not a primary factor in their formulation?

The third and major area of concern is the court's view that

[61] Oscar Handlin, *Is Integration the Answer?*, ATLANTIC MONTHLY, March 1964, at 49. Handlin continues: "[T]herefore, integration is not an end but a means toward an end. Equality of education, housing, employment, and politics is the goal, and genuine progress in that direction will push the problem of de facto segregation in the background, as it has for other groups." *Id.*

integration is the only feasible means to obtain equal educational opportunity. This doctrine collides head-on with the social impossibility at present of achieving this goal. Whether other courts will be flexible enough to explore alternative solutions, instead of following the precedent of *Hobsen v. Hansen*, with its inherent rigidity, might have an important bearing on the ultimate means employed to solve the educational crisis in the urban schools.

There has been no attempt to formulate answers to the issues raised in the case, except to suggest that the courts not narrow their inquiry to the integration question alone. While few educators would deny that integration should be an important goal of any educational system, if techniques and programs are developed which prove to be effective within the different locales, the court should reconsider before condemning them as discriminatory, merely because integration is not an end result.

NEILL G. MCBRYDE

Constitutional Law—Governmental Regulation of Surface Mining Activities

> Surface mining in the United States has affected 3.2 million acres of land. Of this total, 2.0 million acres need varying degrees of treatment to alleviate a range of environmental damage both on-site and off-site. About 20,000 active operations are disturbing the land at a rate estimated in excess of 150,000 acres annually. Data submitted by the surface mining industries indicate that, in 1964, the amount of land partially or completely reclaimed was equivalent to only 31 percent of the area disturbed in that year. Surface mining activities are expected to expand rapidly in coming years. By 1980, it is expected that more than 5 million acres will have been affected by surface mining.
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> Some damage from surface mining is inevitable even with the best mining and land restoration methods. But much can be done to prevent damage and to reclaim mined lands.[1]

I. INTRODUCTION

In an operation having the magnitude of surface mining in the United States, the relationship existing between this activity and the general public and the degree of control to be exercised in the

[1] STRIP AND SURFACE MINE STUDY POLICY COMM., U.S. DEP'T OF THE INTERIOR, SURFACE MINING AND OUR ENVIRONMENT 104 (1967).